Filed 6/28/19 P. v. Sanchez CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. CARLOS SANCHEZ, Defendant and Appellant.	C084811 (Super. Ct. No. 15F06960)

Defendant Carlos Sanchez appeals his convictions for shooting at an unoccupied vehicle and misdemeanor vandalism. He contends the trial court engaged in prejudicial misconduct by questioning witnesses, abused its discretion in admitting irrelevant testimony regarding gunshot residue, erroneously omitted part of the standard jury instruction on vandalism, and erred in awarding custody credits. The People concede the final claim. We modify the judgment to correctly assign credits and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and Stephanie Sanchez[1] were married but separated and had children together. Stephanie was dating Alfredo Ramos. Defendant knew the two were dating and that Ramos sometimes spent the night at Stephanie's.

Stephanie described her apartment's location as "not a good neighborhood" with police, fights, shooting, and vandalism. At about 5:00 a.m. on November 7, 2015, Stephanie, Ramos, and a neighbor, Fermina Camacho, were awakened by loud pounding (as if caused by kicking) on Stephanie's door, followed by gunshots. Stephanie and Camacho each called 911. When Camacho looked out her window, she saw a man in a puffy dark coat with a ponytail walk to a car and place a bag in the trunk. He was the only person in the area at the time. As law enforcement officers arrived at the scene, the man walked away.

Sacramento County Sheriff's Deputy Craig Bliss responded to the scene; the door to Stephanie's apartment was badly damaged and there was a .40-caliber casing on the ground in front of the door. Bliss later saw that Ramos's car had five bullet holes in it, and found additional shell casings by his car that matched the casing found in front of Stephanie's door.

Camacho described to Bliss the person she had seen put something in the trunk of a particular car, and directed Bliss to that car. The hood of the car was warm, suggesting it had been recently driven. Inside the unlocked trunk, Bliss found a bullet that appeared to match the casings, a Walmart bag, a mechanics jumpsuit with the name "Carlos" on the badge, paperwork with defendant's name and picture on it, school and paperwork for defendant's daughter, among other indicia for defendant.

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[1] As defendant and Stephanie share a surname, we refer to Stephanie by her first name.

Stephanie told Bliss that defendant was expected to pick the children up the prior evening, but had not done so. At trial, Stephanie testified defendant was scheduled to pick the children up at 7:00 a.m. the morning of the crimes, but then clarified that the time set for pickup was uncertain.

At about 7:00 a.m., Bliss saw defendant walk up to Stephanie's apartment door and try to open it. When defendant saw Bliss, he turned and walked away. Bliss believed defendant matched the description Camacho had given him, so he stopped him, handcuffed him, and placed him in the back seat of his patrol car. About 20 to 30 minutes later, another deputy collected gunshot residue samples from defendant's hands. A criminalist testified in more detail about the residue located on defendant's hands, as we detail *post*; a portion of that testimony is the subject of a separate claim of error.

The jury found defendant guilty of one count of discharging a firearm at an unoccupied vehicle (Pen. Code, § 247, subd. (b); count one)[2] and one count of misdemeanor vandalism (§ 594, subd. (a); count two). The trial court sentenced defendant to 16 months in state prison for count one and 270 days in county jail for count two, to be served consecutively. The court awarded presentence custody credits as described in detail, *post*.

DISCUSSION

I

Judicial Misconduct

Defendant contends the trial court engaged in a "pervasive pattern of partial and adversarial questioning of defense friendly witnesses and set a defense averse tenor to the case." He characterizes this as judicial misconduct and contends it violated his rights to

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[2] Further undesignated statutory references are to the Penal Code.

due process and a fair trial. While we agree that some of the trial court's questioning was inappropriate and certainly objectionable, we find no prejudice.

A. *Background*

The trial court engaged in extensive questioning of the witnesses, asking questions of each witness, during both direct and cross-examination. The court also interjected additional questions during the jurors' questions to the witnesses. The Attorney General does not dispute defendant's representation that the judge asked "more than 97 questions of four witnesses over the course of a day and a half of trial." Defendant raises three particular areas where he claims the trial court committed misconduct through extensive questioning of witnesses.

1. *Trial Court Questioning of Stephanie*

After Stephanie testified that her apartment was in a bad area, the trial court asked her many questions on this point, including: how long she lived in this area; how long after the incident she moved out of the apartment; did she have a lease on the apartment; was the lease for a set one-year term; and was she in the month-to-month phase of the lease at the time the door was damaged.

The court also asked Stephanie questions about her relationship with defendant, including: Did he contribute toward rent; did he financially support the children; was that support a regular monthly payment or based on his ability to afford it; and, did he give her money to buy things for the children or would he buy them himself. The court asked about Stephanie's relationship with Ramos, including a number of questions regarding how often he spent the night at the apartment.

During Stephanie's testimony regarding the time of defendant's expected arrival to the apartment, the trial court asked a number of questions that seemed skeptical of her testimony that he was scheduled to arrive at the time he did. During jury questioning, the court asked additional questions on that same topic.

2. *Trial Court Questioning of Ramos*

Stephanie had testified she was pregnant with Ramos's child. When Ramos was on the stand, the trial court asked *him* if Stephanie was pregnant with *his* child. Ramos had testified he spent the night at Stephanie's "quite often." After the jurors proposed a question asking whether defendant knew that Ramos often stayed the night at Sanchez's apartment, the court asked Ramos: "And over what period of time, prior to this incident, had you been occasionally going over there to visit Stephanie? Was it for a month? Two months? Three months? Can you estimate for us?" "And altogether, how many times do you think you actually spent the night there?" After Ramos answered, "plenty of times," the court asked, "More than 20 times?"

After Ramos testified the neighborhood was dangerous and that gunshots and violence were a regular occurrence, the court asked how many minutes after hearing banging on the door did Ramos hear gunshots, how many shots did he hear, were they in quick succession or over a period of time, and did Ramos hear any other gunshots that night.

3. *Trial Court Questioning of Deputy Bliss*

On cross-examination of Bliss, as defense counsel queried Bliss about the possible transfer of gunshot residue to defendant's hands from elsewhere, Bliss testified defendant had been placed in the back seat of the patrol car before his hands were swabbed. The trial court then asked Bliss if there had been any other prisoners or suspects in that same place from the beginning of his shift the prior evening until defendant was placed there at approximately 7:00 a.m. The court also asked if Bliss recalled when he had last fired a gun prior to arresting defendant.

B. *Analysis*

1. *Forfeiture*

Defense counsel did not object to the trial court's questioning at any point. This forfeits the appellate claim. (*People v. Harris* (2005) 37 Cal.4th 310, 350.) Defendant

claims an objection would have been futile "because the court may not have even seen its actions as biased; the court might have been operating under the impression that it was merely trying to elicit material evidence crucial to the trial." But even if accurate, that scenario would not render any objection futile. Indeed, it would render an objection *necessary* to bring the perceived problem to the court's attention. Alerting the court to objectionable conduct provides it with the opportunity to correct error and mitigate any prejudice stemming therefrom. (See *People v. Seumanu* (2015) 61 Cal.4th 1293, 1328, 1329 [where defense counsel failed to object to alleged prosecutorial misconduct in argument, objection not futile because "it would have provided the trial court with an opportunity to prevent the prosecutor from injecting her subjective views into the case"].)

2. *Ineffective Assistance of Counsel*

Defendant claims counsel's failure to object constituted ineffective assistance of counsel. To succeed on an ineffective assistance claim, defendant must show counsel's conduct was both deficient and resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-694.) In this context, "[t]he standard for prejudice is a reasonable probability that, but for counsel's error, the verdict would have been different. [Citations.]" (*People v. Neely* (2009) 176 Cal.App.4th 787, 796.)

We do not endorse the trial court's extensive questioning of witnesses as presented here. While it is true that a trial court "may examine witnesses to elicit or clarify testimony" (*People v. Pierce* (1970) 11 Cal.App.3d 313, 321), it is also true that "[u]nwarranted interruptions of counsel that interfere with a properly conducted examination, excessive questioning that virtually takes the witness out of counsel's hands, or a display of partisanship are improper." (5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Criminal Trial, § 544.) As we have outlined above, some of the questions asked by the trial court concerned arguably irrelevant or potentially prejudicial topics such as the questions to Ramos and Stephanie regarding the unborn baby's parentage and questions about defendant's provision of child support.

The Attorney General argues that the questions at issue were merely meant to "clarify testimony and move the trial along in an efficient manner." It is true that a trial court's participation in the examination of witnesses, without more, is insufficient to establish judicial misconduct because "[a] trial court has both the discretion and the duty to ask questions of witnesses, provided this is done in an effort to elicit material facts or to clarify confusing or unclear testimony. [Citations.]" (*People v. Cook* (2006) 39 Cal.4th 566, 597.) Although the record here shows that some of the court's questions were clearly unnecessary and potentially problematic when reviewed in their totality, this does not establish misconduct. We do not " 'determine whether the trial judge's conduct left something to be desired, or even whether some comments would have been better left unsaid. Rather, we must determine whether the judge's behavior was so prejudicial that it denied [the defendant] a fair, as opposed to a perfect, trial. [Citations.]' In deciding whether a trial court has manifested bias in the presentation of evidence, we have said that such a violation occurs only where the judge ' "officiously and unnecessarily usurp[ed] the duties of the prosecutor . . . and in so doing create[d] the impression that he [was] allying himself with the prosecution." ' [Citation.]" (*People v. Harris, supra*, 37 Cal.4th at pp. 310, 347.)

The question for us here is whether defense counsel's failure to object to this conduct, which we have decided was not in and of itself *mis*conduct, was deficient representation. Defendant admits in his briefing, and we agree, that "the extent of the court's interference may not [have been] evident to trial counsel until the end of the trial" and "may only become evident when one assesses the entire record on appeal." This observation, although commendable for its candor, undercuts defendant's claim that counsel's performance was ineffective. It is not deficient representation for trial counsel to fail to object to something that does not appear objectionable during trial.

Further, we cannot say that refraining from objecting was not a tactical choice by trial counsel. Counsel would have been able to observe firsthand what we have gleaned

from reviewing the record: that the witnesses held up to questioning quite well. As the Attorney General points out (albeit without citation to the record), many of the evidentiary points elicited by the trial court when questioning the witnesses actually bolstered the defense. Defense counsel was still able to argue that Stephanie and Ramos were "telling the truth", argued the high crime nature of the neighborhood based on their testimony, and argued loosely that defendant was a supportive father who was expected at the residence at the time he arrived; in large part Stephanie's consistent responses to the trial court's and jury's questions supported this argument. We see no ineffective assistance of counsel on this record.[3]

II

Gunshot Residue Testimony

Defendant next contends the trial court abused its discretion in admitting the criminalist's testimony, in response to a jurors' question, regarding the average number of gunshot residue particles found in normal testing. He contends the analysis in the answer was erroneous and the testimony was irrelevant. We agree the evidence was irrelevant, and therefore should have been excluded, but find no prejudice.

A. *Background*

During direct and cross-examination, criminalist Jason Hooks testified that there was a minimum of 19 distinct gunshot residue particles on defendant's hands. When three or more particles are found on a person's hands, a criminalist can conclude the residue was deposited "by firing a gun, being near a gun when it is fired, or by handling a fired gun or fired ammunition." It is not reasonable or likely that a person would have three or more particles on their hands if they did not meet one of these criteria. However, the presence of gunshot residue does not necessarily mean the person fired the weapon.

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[3] Because we do not find counsel's performance deficient, we need not address the issue of prejudice.

When fewer than three particles are found, a criminalist cannot exclude the possibility that the residue is as a result of transfer from touching a contaminated article.

Hooks testified a number of factors can affect the amount of gunshot residue on a surface; the type of weapon, the type of ammunition, the orientation of the weapon, and intervening activities. As an example of this variability, Hooks recounted that during training, he had conducted four separate tests on his hands after firing a weapon with various intervening events: On the first test, immediately after firing the weapon, there were over 1,400 particles; on the second test, after firing the weapon and doing an hour of clerical work, there were 55 particles; on the third test, after firing the weapon and doing three hours of clerical work, there were five particles; on the final test, after firing the weapon and quickly rinsing his hands, there were zero particles. In addition, differences in receiving surfaces can affect the amount of gunshot residue, factors including the smoothness of the surface, hardness, whether it is metal, plastic or cloth, and the weave of a cloth. The number of times a gun is fired may also affect how much residue there is, as will the composition of the primer. He testified gunshot residue can also be transferred from other objects, including a police officer's clothing, service weapon, gun belt, and vehicle. He would not expect to find a large number of particles from transfer from a patrol car seat and would be surprised for someone to have more than one particle from a vehicle transfer. He would not expect to find any appreciable transfer of gunshot residue from an officer handling his weapon and then handcuffing a person. He would not expect to see gunshot residue on a door knob 40 to 45 away from where the gun was fired.

The trial court asked the jurors' question: "What's the average number of GSR particles found in normal GSR testing? The juror makes reference to -- is it three, you said?" Hooks answered, "Three would be our cut-off, to where we no longer include the statement where secondary transfer is a realistic possibility. [¶] From my experience testing over a hundred cases easily over the last approximately six years, if I were forced to have an average, I would say six, seven. [¶] So three or four particles, I would say, is

on the lower side. Six to eight, I would say, is around average. Any time – these are total particles over four disks. [¶] [Y]ou start getting over 10, I would start saying that's a lot. Numbers like 20 and beyond is a very large amount, so even though the number sounds small here, for gunshot residue analysis in my experience, 19 is a pretty substantial amount of gunshot residue particles to find."

Defense counsel objected to the jurors' question as lacking foundation, as it was not based upon any recognized standard or study, and as prejudicial under Evidence Code section 352.[4] Counsel also moved to strike the answer as irrelevant, arguing that Hooks had explained that the analyses in these cases are complicated and "highly depend on the individual facts and circumstances. [¶] I don't think it's fair or proper for him to be able to distill into a numerical result what an expected particle count would be." The prosecutor argued Hooks' testimony was based on his experience and what it had shown in terms of "number of particles and what he perceived to be a lot versus a minimal amount." The court denied defendant's motion to strike (without addressing the Evidence Code section 352 objection) because: "the door was open so to speak"; the question was "well within the scope of questions asked by both counsel"; and, as the prosecution put it, the answer was based on "what [the criminalist's] experience had shown in terms of numbers of particles and what he perceived to be a lot versus a minimal amount."

B. *Analysis*

We review a trial court's evidentiary rulings, including as to expert witness testimony, for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717; *People*

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[4] Prior to the start of trial, the trial court instructed the attorneys that if there were objections to a jurors' question they should be raised at the first opportunity outside the presence of the jury. It does not appear from the record that the court consulted with the attorneys prior to asking the jurors' questions, so the first opportunity to object was after the question had been asked and answered.

v. Prince (2007) 40 Cal.4th 1179, 1222.) The "trial court has broad discretion to determine whether evidence is relevant." (*People v. Lomax* (2010) 49 Cal.4th 530, 581.) However, the court has no discretion to admit irrelevant evidence. (*People v. Blacksher* (2011) 52 Cal.4th 769, 819.) " 'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness . . . , having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

As we described above, Hooks testified in detail that many factors impact how many particles of residue will be found and the range of particles found was wide. Given the numerous variables that affect the amount of residue, testimony on "averages" or "normal" amounts was not relevant without more information specifically tailored to the facts in this case. Further, here the issue was whether defendant had fired the gun or instead had collected gunshot particles on his hands from other contacts. Hooks' testimony already had established that it was not likely a person would have three or more particles on his hands unless he had fired a gun, been near a gun when it was fired, or handled a fired gun or (spent) ammunition. Finding more than three particles from transference alone was unlikely, and defendant had 19 residue particles on his hands. The characterization of the number of particles on defendant's hands as "a lot" or an "average" or "normal" amount had no tendency to prove any disputed fact in this case.

"Under Evidence Code section 352, the probative value of a defendant's prior acts must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Davis* (2009) 46 Cal.4th 539, 602.) When ruling on an evidentiary objection based on Evidence Code section 352, the record must demonstrate the trial court understood and fulfilled its responsibilities under this section. Such a demonstration does not require that the trial court expressly weigh prejudice against probative value, or even expressly state that it has done so. (*People v. Jennings* (2000) 81 Cal.App.4th 1301,

1315.) Courts will infer an implicit weighing well short of an express statement. (*People v. Villatoro* (2012) 54 Cal.4th 1152, 1168.) However, there must be something in the record to affirmatively show that the court did, in fact, weigh these factors. (*People v. Cox* (1991) 53 Cal.3d 618, 665 disapproved of on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390.) "A failure to exercise discretion also may constitute an abuse of discretion." (*People v. Sandoval* (2007) 41 Cal.4th 825, 847–848.)

Nothing in the record suggests the trial court adequately exercised its discretion here. The court overruled the objection and denied the motion to strike on the basis that counsel had "opened the door" to Hooks' testimony. The court did not discuss or appear to consider the *relevance* of the evidence or any potential prejudice or danger of confusion or misleading the jury. (Evid. Code, § 352; see *People v. Kerley* (2018) 23 Cal.App.5th 513, 535 [the first point of analysis under Evidence Code section 352 is relevance].) Further, that a door has been opened in and of itself is not a valid reason for overruling an otherwise meritorious objection. Irrelevant or incompetent testimony should be excluded irrespective of whether testimony on the same subject has already been elicited. (See *People v. Johnson* (1964) 229 Cal.App.2d 162, 170.) Under the doctrine of "opening the door," previously irrelevant testimony may become relevant and thereby admissible--or evidence that was relevant but otherwise inadmissible may become admissible--to avoid giving the jury a misleading impression of the evidence. (See *People v. Steele* (2002) 27 Cal.4th , 1230, 1248-1249; *People v. Kerley*, *supra*, 23 Cal.App.5th at p. 553.) But, "opening the door" does not justify admitting evidence that was *and remains* irrelevant. (Evid. Code, § 350; See *In re Lucas* (2004) 33 Cal.4th 682, 733; *People v. Wells* (1949) 33 Cal.2d 330, 340.) Because the testimony about "averages" or "normal" amounts of gunshot residue had no tendency to resolve any point in dispute, it was irrelevant and its admission was error.

C. *Harmless Error*

We review claims of erroneous admission of expert testimony under the harmless error standard announced by *People v. Watson* (1956) 46 Cal.2d 818 at page 836; that is, whether it is reasonably probable a better result would have been obtained had the evidence been excluded. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 76; *People v. Prieto* (2003) 30 Cal.4th 226, 247.)

Defendant claims this error prejudiced him because it gave the jurors a false baseline that indicated guilt, but he does not argue that it is reasonably likely the result of the trial would have been different in absence of this error. We see no such likelihood. As discussed *ante,* there was ample properly admitted evidence of defendant's guilt, by expert and other testimony. Immediately after hearing the gunshots, Camacho saw a man matching defendant's description pacing back and forth between the street and the area near Stephanie's door and putting a bag in the trunk of a car. The car was filled with indicia of defendant's use. No one else was in the area. There was a bullet in the trunk of the car that matched the discharged bullet casings found by Stephanie's door and Ramos's trunk. There were 19 gunshot residue particles--an amount consistent only with recent exposure to a fired gun or spent ammunition--on defendant's hands, front and back. This evidence sufficiently supported the verdicts such that a different outcome absent the error was not reasonably likely.

III

Instructional Error

Defendant contends the trial court erred in removing the definition of "maliciously" from the standard jury instruction defining vandalism. (CALCRIM No. 2900.) Specifically, CALCRIM No. 2900 first requires malicious damage, defacement, or destruction, and then defines acting "maliciously" as, "when he or she intentionally does a wrongful act or when he or she acts with the unlawful intent to annoy or injure

someone else." This is not optional (bracketed) language, but the trial court nonetheless omitted it; the record does not reflect why.

" ' "[T]he language of a statute defining a crime or defense is generally an appropriate and desirable basis for an instruction, and is ordinarily sufficient when the defendant fails to request amplification. If the jury would have no difficulty in understanding the statute without guidance, the court need do no more than instruct in statutory language." ' [Citation.] However, the trial court has a sua sponte duty to give jurors explanatory instructions when a term in an instruction has 'a technical meaning that is peculiar to the law.' [Citation.] 'The rule to be applied in determining whether the meaning of a statute is adequately conveyed by its express terms is well established. When a word or phrase " 'is commonly understood by those familiar with the English language and is not used in a technical sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request.' " [Citations.] A word or phrase having a technical, legal meaning requiring clarification by the court is one that has a definition that *differs* from its nonlegal meaning. [Citation.]' [Citation.]" (*People v. Adams* (2004) 124 Cal.App.4th 1486, 1493.)

Defendant contends that: " 'maliciously' is a legal term of art whose meaning the jury must know in order to be able to make an intelligent finding on the mens rea required for vandalism." But he cites no authority to support his claim that "maliciously" as used here to describe destruction of property is different than the common meaning of the word and instead is a technical legal term requiring specialized instruction.

Malice is the "desire to cause pain, injury, or distress to another" or the "intent to commit an unlawful act or cause harm without legal justification or excuse." (Merriam-Webster's Collegiate Dict. (11th Ed. 2006) p. 752, col. 1.) This common understanding of malice (and thereby maliciously) is not significantly different from the definition provided in CALCRIM 2900. Accordingly, although the better practice is to give the standard jury instruction as written, the trial court was not required to give additional

instruction beyond that of the statutory language. (*People v. Adams, supra*, 124 Cal.App.4th at p. 1494.)

IV

Credits

Defendant sent the trial court a letter pursuant to *People v. Fares* (1993) 16 Cal.App.4th 954, seeking four additional days of presentence custody credit. The minute order indicates the court granted defendant's request and specifically ordered the additional credits assigned to count two. Defendant contends this was error because count two was a misdemeanor sentence of 270 days, which defendant has already served. The People agree. We agree with the parties that the judgment must be modified and the abstract of judgment amended to assign the additional credits to the felony count of conviction, count one.

The trial court originally granted defendant 721 days of presentence custody credit and ordered the credits applied first to count two. It increased the total award to 725 days per the *Fares* letter but applied those four days to count two as well. This was error, as defendant's term on count two had already been completed based on the original application of credit at the time of sentencing. Accordingly, the additional four days of credit--two actual and two conduct--must be applied to count one.

DISPOSITION

The judgment is modified to apply four additional days of credit to count one, two actual and two conduct, for a total of 456 days. The trial court is directed to issue an

amended abstract of judgment to reflect the additional credit and provide a certified copy to the appropriate authorities.

/s/
Duarte, J.

We concur:

/s/
Blease, Acting P. J.

/s/
Mauro, J.